Order XI

DISCOVERY AND INSPECTION

Rule–1: Discovery by interrogatories.—In any suit the plaintiff or defendant by leave of the Court may, within 10 days from the date of framing of issues, deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross- examination of a witness.

The words, "within 10 days from the date of framing of issues", after the words, "the Court may", were inserted by the Law Reforms Ordinance, 1983 (Ordinance XLVIII of 1983).

See also rules 130 and 131, C. R. & O and para 13(12), Civil Suit Instructions Manual.

Form of order for delivery of interrogatories, Form No. 1, App. C, Sch. 1 = H. C. Form No. (G) 18.

Rule–2: Particular interrogatories to be submitted.—On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

Rule–3: Costs of interrogatories.—In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

Rule–4: Form of interrogatories.—Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

Rule–5: Corporations.—Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

Rule–6: Objections to interrogatories by answer.—Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

Rule–7: Setting aside and striking out interrogatories.—Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

Rule–8: Affidavit in answer, filing.—Interrogatories shall be answered by affidavit to be filed within ten days.

Rule–9: From of affidavit in answer.—An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

Rule–10: No exception to be taken.—No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

Rule–11: Order to answer or answer further.—Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

Rule–12: Application for discovery of documents.—Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

Also see para-13 (6), Civil Suit Instructions Manual.
Form of order for affidavit as to documents, Form No. 4, App. C, Sch. I.

Rule–13: Affidavit of documents.—The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No.5 in Appendix C, with such variations as circumstances may require.

Also see para 13 (6), Civil Suit Instructions Manual.

Rule–14: Production of Documents.—It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

Also see para 13(10), Civil Suit Instructions Manual.
Form of order to produce documents, Form No. 6, App. C, Sch. I = H. C. Form No. (J) 19.

Rule–15: Inspection of documents referred to in pleadings or affidavits.—Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document

relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

See also section 164, Evidence Act, 1872

Rule–16: Notice to produce.—Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No.7 in Appendix C, with such variations as circumstances may require.

Rule–17: Time for inspection when notice given.—The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No 8 in Appendix C, with such variations as circumstances may require.

Rule–18: Order for inspection.—(1)Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

Rule–19: Verified copies.—(1)Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

Cf. Sections 130, 131, 162, Evidence Act, 1872.

Rule–20: Premature discovery.—Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

Rule–21: Non-compliance with order for discovery.—Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

An order under this rule is an appealable order. See Or. 43, r. 1.

Rule–22: Using answers to interrogatories at trial.—Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.

Rule–23: Order to apply to minors.—This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.

Order XII

ADMISSIONS

Rule–1: Notice of admission of case.—Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

See also rules 130 and 131, C. R. & O and para 13(7), (8), Civil Suit Instructions Manual

Rule–2: Notice to admit documents.—Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

See also rules 130 and 163, C.R.& O. and para 13(7), Civil Suit Instructions Manual.

Rule–3: Form of notice.—A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

Rule–4: Notice to admit facts.—Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favor of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

See also rule 130, C.R. & O. and para 13(8), Civil Suit Instructions Manual.

Rule–5: Form of admission.—A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No.11 in Appendix C, with such variations as circumstances may require.

Rule–6: Judgment on admissions.—Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

The power of the court to pass judgment on admissions is discretionary and cannot be claimed as of right.

Galstaun -vs- Sassoon & Company, 27 CWN 783
Premsukhdas -vs- Udairam, 45 C 138

Rule–7: Affidavit of signature.—An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required.

Rule–8: Notice to produce documents.—Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

Notice enables secondary evidence of the documents to be given if not produced. See sections 65 (a) and 66, Evidence Act, 1872.

Rule–9: Costs.—If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

See also rule 164, C.R. & O.

Order XIII

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS

Rule–1: Omitted by Ordinance No. XLVIII of 1983
Rule–2: Omitted by Ordinance No. XLVIII of 1983

Rule–3: Rejection of irrelevant or inadmissible documents.—The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

See also paras 24 and 26(9), Civil Suit Instructions Manual.

Rule–4: Endorsements on documents admitted in evidence.—(1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely: –

(a) the number and title of the suit,

(b) the name of the person producing the document,

(c) the date on which it was produced, and

(d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

See also rules 396 and 403, C.R.&O. and para 26 (8), Civil Suit Instructions Manual. As to how documents admitted in evidence should be endorsed and marked with exhibit marks, see rules 396-403, C.R.& O.

Form of list of documents admitted in evidence, H. C. Form No. (J) 23.

Rule–5: Endorsements on copies of admitted entries in books, accounts and records.—(1) Save in so far is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished–

(a) where the record, book or account is produced on behalf of a party, then by that party, or

(b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

Return of public document or a document in public custody after placing a certified copy. See rule 116, C.R.&O. See also rule 403, C.R.& O.

Rule–6: Endorsements on documents rejected as inadmissible in evidence.—Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

See also rule 404, C.R.& O and para 26 (9), Civil Suit Instructions Manual.

Rule–7: Recording of admitted and return of rejected documents.—(1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

Documents not admitted in evidence shall not be marked and shall be removed and destroyed if not taken back within the prescribed time. See rule 407, C. R. & O.

It is the duty of the court before proceeding to judgment under Or. 20, r. 1 to revise the record and to have removed all documents not admitted in evidence. See para 29, Civil Suit Instructions Manual and rule 407, C.R. & O.

Rule–8: Court may order any document to be impounded.—Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

See also rule 395, C. R. & O. and sections 33 to 40 of the Stamp Act, 1899.

Rule–9: Return of admitted documents.—(1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same-

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of:

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so:

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

See also rules 404, 407 and 408, C. R. & O and para 29(2), note, Civil Suit Instructions Manual.

Return of exhibited documents transmitted to the District Record Room, see rule 456, C. R. & O. Destruction of exhibited documents not taken back, see rules 480-483, C. R. & O.

Documents, which shall not be returned, see rule 405, C. R. & O.

Rule-10: Court may send for papers from its own records or from other Courts.—(1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

Production of public documents and records. see rules113 to 120, C. R. & 0.
Production of documents from civil courts, sec rule 117, C. R. & 0.
Production of documents called from criminal courts, sec rule 118, C. R. & O.
Production of post office records, see rule 120, C. R. & O.
Form of letter calling for records, see H. C. Form No. (M) 10.
Form of summons to witness to produce document, see Form No. 13, App. B. Sch. I = H. C. Form No. (P) 10.

Rule-11: Provisions as to documents applied to material objects.—The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

See also section 60, proviso, Evidence Act, 1872.

Order XIV

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON

Rule 1: Framing of Issues.—(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds: (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

Provided that in any case the issues shall be framed and recorded, subject to the provisions of rules 4 and 5, within fifteen days from the date of first hearing of the suit or the date of filing of the written statement, whichever is later.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

Proviso to sub-rule (5) was added by Ordinance XLVIII of 1983

No issues can arise in regard to admitted facts. Issues are to be framed only in respect of those facts which have been alleged by one party and either denied or not admitted by the other party.

See para 12, Civil Suit Instructions Manual.

Issues must be framed by the presiding judge himself. See rule 132, C.R.& O. Issues settled by a judge who knows nothing about the case and usually signs the issues drafted by lawyers are worse than useless.

Ratna Sabhapathy -vs- Ammakannammal, 1930 M 78

Date fixed for settlement of issue is date fixed for hearing within Or. 9, r. 8

Firm -vs- Rambahadur, 48 IC 192 (Patna).

Rule–2: Issues of law and of fact.—Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined

The scope of this rule has been largely limited by amendment of rule 5 of Order 20 by Ordinance No. XLVIII of 1983 and the decision in

Md. Sultan Mia -vs- Sree Haradhan Saha and others, 40 DLR 236

Rule–3: Materials from which issues may be framed.—The Court may frame the issues from all or any of the following materials: –

(a) allegations made on oath by the parties, or any persons present on their behalf, or made by the pleaders of such parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of documents produced by either party.

See rule 132, C.R. & O and para 12, Civil Suit Instructions Manual.

Rule–4: Court may examine witnesses or documents before framing issues.—Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

See para 12(2), Civil Suit Instructions Mannual.

Rule–5: Power to amend, and strike out, issues.—(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments and additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

Rule–6: Questions of fact or law may by agreement be stated in form of issues.—Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,–

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

Form of agreement, see Form No. 1, App. H, Sch. I.

Rule–7: Court, if satisfied that agreement was executed in good faith, may pronounce judgment.—Where the Court is satisfied, after making such inquiry as it deems proper, –

(a) that the agreement was duly executed by the parties,

(b) that they have a substantial interest in the decision of such question as aforesaid, and

(c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court;

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.

The principles laid down in Or. 14 rr. 6-7 are applicable to a case where the parties agree to refer certain issues to a commissioner. The commissioner's finding is final and there is no appeal.

Bahir -vs- Nabin, 6 CWN 121

Rule–8: Fixing date for final hearing.—After the issues are framed, the Court shall, within one hundred and twenty days thereof, fix a date for final hearing of the suit.

Rule 8 was inserted by Ordinance XLVIII of 1983.

Order XV

DISPOSAL OF THE SUIT AT THE FIRST HEARING

Rule–1: Parties not at issue.—Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

Rule–2: One of several defendants not at issue.—Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

Rule–3: Parties at issue.—(1) Where the parties are at issue on some question of law or fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit:

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

Rule–4: Failure to produce evidence.—Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

If a suit is dismissed under this rule, the proper course is to appeal and not to apply under Or. 9.

Hinga -vs- Munna, 8 CWN 97

Order XVI

SUMMONING AND ATTENDANCE OF WITNESSES

Rule–1: Summons to attend to give evidence or produce documents.—At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

In view of this rule the parties are entitled as of right to obtain summonses upon witnesses immediately after the institution of the suit.

Bhagwat -vs- Debi, 16A 218; Kazi -vs- Kazi, 9 B. 308; Abdul -vs- Hrishikesh, 49 CLJ 546.

See also rule 63 and 64, C.R. & O.
Form of summons, Form No. 13, App. B, Sch. I = H. C. Form No. (P) 10.

Rule–2: Expenses of witness to be fixed by Court.—(1) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the persons summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

Experts (2):–In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

Scale of expenses (3):–Where the Court is subordinate to the High Court Division, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

The words, "The Court shall fix in respect of each summons," in sub-rule(1) in this rule and the words, "In fixing such an amount", in sub-rule (2) in this rule were respectively substituted for the words, "The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court" and "In determining the amount payable under this rule" by rule made by the Calcutta High Court under section 122 of the Code Vide Notification No. 10428-G, dated the 25th July, 1928 published in the Calcutta Gazette dated the 2nd August, 1928, Part-1, Page-1643.

See also rules 63, 617 and 619, C.R.& O.

As under the new rule 7-A the parties themselves can now serve summons on their witnesses, the former requirement of paying expenses of witnesses into court has been done away with. Under this rule the court will now only fix the sum of money to be paid as travelling and other expenses and the parties will pay the amount to their witnesses at the time of service (Or. 16, r. 3). The office will return to the parties on their pleaders for service the processes filed by them after entry of the expenses fixed the court (Rule 99 (2), C. R & O). In cases in which service is required through the agency of the court under rule 7-A (iii) process-fees shall be filed by the parties (Rule 63, C. R & O) as also witness's expenses in cash (Rule 617, C. R & O).

Rule–3: Tender of expenses to witness.—The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

The words "so fixed" in rule 3 were substituted for the words "so paid into Court" by rule made by the Calcutta High Court under section 122 of the Code Vide Notification No. 10428-G dated the 25th July 1928 published in the Calcutta Gazette dated the 2nd August, 1928 Part-1, P. 1643.

Rule–4: Procedure where insufficient sum paid in.—(1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned, without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Expenses of witnesses detained more than one day (2):–Where it is necessary to detain the person summoned for a longer period than one day, the Court may, form time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

The words, "so fixed" in sub-rule (1) were substituted for the words, "paid into Court" by rule made under section 122 of Code by the Calcutta High Court, vide Notification No. 10428-G, dated the 25th July 1928 published in the Calcutta Gazette dated the 2nd August, 1928 Part-1, P. 1643.

Rule–5: Time, place and purpose of attendance to be specified in summons.—Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

See also rules 58, 60, 61, 62 and 63, C.R. & O.

Rule–6: Summons to produce document.—Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

See also rule 115, C. R. & O.

For procedure to be followed if summons not obeyed, see Or 16, rr. 10,11,12, 17 & 18. For summons to Collector or other public officer in charge of documents for their production see rule 115, C. R. & O.

Rule–7: Power to require persons present in Court to give evidence or produce document.—Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

Rule:–7A:(i)Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summonses under this Order to the party applying therefor. The service shall be effected by or on behalf of such party in delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court.

(ii) Rules 16 and 18 of Order V shall apply to summons personally served under this rule, as though the person effecting service were a serving officer.

(iii) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in like manner as a summons to a defendant.

This rule was inserted by rule made by the Calcutta High Court under section 122 Vide Notification No. 10428-G dated the 25th July 1928 published in the Calcutta Gazette dated the 2nd August, 1928, Part-1, Page-1643.

This rule introduces the system of service of summons on witnesses by the parties themselves without the necessity of payment of process fees. Resort to clause, (iii) can not be taken unless the party is unable to serve summons under clause (i).

See also rules 63, 99 and 597, C.R.& O.

Rule–8: Summons how served.—(1) Every summons under this Order not being a summons made over to a party for service under rule 7A(i) of this Order, shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply thereto.

(2) The party applying for a summons to be served under this rule shall, before the summons is granted and within a period to be fixed, pay into Court the sum fixed by the Court under rule 2 of this Order.

In consequence of insertion of rule 7A and the amendment of rule 2, the old rule was substituted by this rule by rule made by the Calcutta High Court under section 122 Vide Notification No. 10428-G dated the 25th July, 1928 published in the Calcutta Gazette dated the 2nd August, 1928, Part-1, Page-1643.

Rule–9: Time for serving summons.—Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

See also rule 97, C.R. & O.

Rule–10: Procedure where witness fails to comply with summons.—(1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such

summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may,. in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

Form of proclamation requiring attendance of witness, see Forms Nos. 14,15, App. B, Sch. I = H. C. Form No. (P) 12.
Form of order of attachment of property, see Form No. 16 App. B, Sch I = H. C. Form No. (P) 13. Form of warrant of arrest of witness, see Form No. 17, App. B, Sch. I H. C = Form No. (P) 11.

Rule–11: If witness appears, attachment may be withdrawn.— Where, at any time after the attachment of his property, such person appears and satisfies the Court,–

(a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and,

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

Rule–12: Procedure if witness fails to appear.—The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred Taka as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any party thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any:

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

Before passing an order under this rule it is mandatory to follow the procedure laid down therein.

Nabadwip -vs- Secretary of State, 20 CWN 511
Shibkumari -vs- Secretary of State, 31 CLJ 363;
Ashutosh -vs- Secretary of State, 57 IC 302

Rule–13: Mode of attachment.—The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.

Rule–14: Court may of its own accord summon as witnesses strangers to suit.—Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

Rule–15: Duty of persons summoned to give evidence or produce document.— Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

See also rules 58 and 135, C.R. & O.

Rule–16: When they may depart.—(1) A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of.

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.

When a case is adjourned a specific order should be recorded directing the witnesses in attendance to attend on the day their attendance may be required.
See rules 387, C. R &O.

Rule–17: Application of rules 10 to 13.—The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16.

Rule–18: Procedure where witness apprehended cannot give evidence or produce document.—Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison.

Form of warrant of committal, see Forms Nos. 18, 19, App. B, Sch. I.

Rule–19: No witness to be ordered to attend in person unless resident within certain limits.—No one shall be ordered to attend in person to give evidence unless he resides–

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

Rule–20: Consequence of refusal of party to give evidence when called on by Court.—Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

If the document is produced the requirement of law is fulfilled. Where the plaintiff on being asked by the court, produced a certified copy of a judgment in his possession but declined to exhibit it as evidence in the case, the court could not pass an order of dismissal of the suit under this rule.

Radhanath -vs- Uttam. 28 CLJ 24

Rule–21: Rules as to witnesses to apply to parties summoned.—(1) Where any party to a suit is required by any other party thereto to give evidence, or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

(2) When any party to a suit gives evidence on his own behalf, the Court may in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing.

This rule was substituted for the old rule by rule made by the Calcutta High Court under section 122 of the Code, Vide Notification No. 15264-G dated the 11th November 1927, published in Calcutta Gazette dated the 17th November, 1927, Part-I, Page-2377.

Order XVII

ADJOURNMENTS

Rule–1: Court may grant time and adjourn hearing.—(1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

Costs of adjournment.—(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

It is often very right indeed for a Judge to refuse adjournments which are asked for by both sides.

Dutta. -vs- Shamsuddin, 34, CWN P 419

No judicial proceeding shall be adjourned sine die; previous notice should be given to the opposite party regarding adjournment or advancement of hearing the suit.

The trial when once commenced shall except for good and sufficient reasons proceed throughout the day and from day to day until it is completed including the hearing of arguments.

See rules 124 to 129, C.R. & O and para 18, Civil Suit Instructions Manual;

It is of utmost importance that frequent and unnecessary postponements and attendance of witnesses should be consistently discouraged.

See rule 128, C.R. & O.

As to importance of expeditious disposal of suits and common causes of delay, see paras 36, 37, Civil Suit Instructions Manual and Report On The Causes Of Delay In Disposal Of Cases And Recommendations For Their Elimination And Better Management of Courts published on June 30, 1989.

Rule–2: Procedure if parties fail to appear on day fixed.—Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

The difference between Order 9 and Order 17 is that the latter applies to adjourned hearing and not to first hearing.

When a party who appeared at the first hearing fails to appear at the adjourned hearing the court may proceed in one of the modes directed in Order 9. "Adjourned" under this rule means adjourned at the instance of the parties and not adjournment by the court of its own motion.

Toolseymoney -vs- Prasadmoney 2 CWN 490

Or. 17, r. 2 contemplates the absence of one of the parties at an adjourned hearing no matter for what purpose the adjournment was made. In the former case the court may proceed under Or. 9, r. 6 or Or. 9. r. 8, as the case may be. In the latter case, it may proceed under Or. 9, r. 3. Or. 17, r. 3 also applies to an adjourned hearing but the rule is applicable only to cases where a party to whom time has been granted on his own application fails to do certain specified acts for which time was allowed and who has defaulted

Enatullah -vs- Jiban, 41 C 956, Krista -vs- Pancharum, 47 CLJ 467

Rule–3: Court may proceed notwithstanding either party fails to produce evidence, etc.—Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

This rule empowers the court to proceed to a decision on the merits upon the default if there are proper materials on the record for such a decision instead of taking recourse to dispose of the suit under Or. 9.

Mariannessa -vs- Ramkalpa, 34 C 235
Miksi Marak -vs- Jogendra. 39 CWN 859

If a suit is dismissed under Or. 17, r. 2 read with Or. 9, r. 8 the remedy is by an application under Or. 9, r. 9, but if the suit is dismissed under Or. 17, r. 3 the remedy is by way of appeal.

Chandramathi -vs- Narayansami, 33 M 241

Order XVIII

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

Rule–1: Right to begin.—The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

The right to begin or the privilege of opening the case is determined by the rules of evidence. The general rule is that the party on whom the onus probandi lies should begin. As to rules governing burden of proof, see sections 101 – 114, Evidence Act, 1872.

Rule–2: Statement and production of evidence.—(1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

See also para – 22, Civil Suit Instructions Manual.

Rule–2A. Notwithstanding anything contained in clauses (I) and (2) of rule 2, the Court may for sufficient reason go on with the hearing, although the evidence of the party having the right to begin has not been concluded, and may also allow either party to produce any witness at any stage of the suit.

This rule was inserted by rule made by the Calcutta High Court under section 22 of the Code Vide Notification No. 15165-G, dated the 8th November, 1927 published in the Calcutta Gazette dated the 11th November, 1927 Part-1, Page-2377.

Rule–3: Evidence where several issues.—Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his

evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

Rule–4: Witnesses to be examined in open Court.—The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

No person shall testify as a witness except on oath or affirmation. See section 6, Oaths Act. See also rules 350-351, C.R. & O.

Privileges of pardanashin women, see section 132; Or. 26 r. 1.

Examination of witnesses on commission, see section 75, Or. 26, rr. 1-8 and rules 234-256, C.R. & O.

Parties are required to file their lists of witnesses in attendance in the respective courts (not with the Nazir) within the time fixed.

See rule 135, C.R. & O.

Rule–5: How evidence shall be taken in appealable cases.—In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

See also rule 133, C.R. & O.
See also paras 23-24, Civil Suit Instructions Manual.
Question by court, see section 155, Evidence Act, 1872, and para 25, Civil Suit Instructions Manual.

Rule–6: When deposition to be interpreted.—Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given.

Rule–7: Evidence under section 138.—Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule.

Rule–8: Memorandum when evidence not taken down by Judge.—Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

See also rule 133, C.R. & O.

Rule–9: When evidence may be taken in English.—Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down.

Rule–10: Any particular question and answer may be taken down.—The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

Rule–11: Questions objected to and allowed by Court.—Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

Rule–12: Remarks on demeanour of witnesses.—The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

See observations of Lord Atkin: Sitalakshmi –vs- Venkata, 34 CWN 593 P.C.

Rule–13: Memorandum of evidence in unappeable cases.—In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

See also rules 133 – 134, C.R. & O.

Rule–14: Judge unable to make such memorandum to record reasons of his inability.—(1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

(2) Every memorandum so made shall form part of the record.

See rule 133, C.R. & O.

Rule–15: Power to deal with evidence taken before another Judge.—(1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

Where evidence and arguments were heard by one Judge, his successor can deliver judgment without hearing the pleaders.

Sub-rule (2) clearly contemplates transfer after the case has been heard in part.

Palanisami –vs- Thondama, 26, M. 595

Every Judge proceeding on transfer or leave must write judgments in all cases and appeals heard up to and including the stage of arguments. See rule 141, C.R. & O.

Rule–16: Power to examine witness immediately.—(1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness at any time after the institution of the suit take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it and it may then be read at any hearing of the suit.

Such examination is known as *de bene esse.*

See also para 18 (14), Civil Suit Instructions Manual.

Form of notice, see Form No. 6, App. H, Sch. I.

Rule–17: Court may recall and examine witness.—The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

See also para 25, Civil Suit Instructions Manual.

See also 165, Evidence Act, 1872

Rule–18: Power of Court to inspect.—The Court may at any stage of a suit inspect any property or thing concerning which any question may arise.

Under section 60, proviso 2, Evidence Act, 1872, the court may require the production of a material thing for its inspection, see section 94 (b) of the Code and section 165, Evidence Act, 1872. The court may order the inspection of any property which is the subject-matter of the suit, see Or. 39, r. 7. The court may make local inspection in person, see Or. 18, r. 18 and Or. 26, rule 9. See also

Sabhapaty -vs- Perummal, 44 M 640

Rule–19: Time for completion of hearing.—(1) The Court shall complete the hearing of a suit within one hundred and twenty days from the date fixed for its final hearing.

(2) In this rule, in determining the time, only the working days shall be counted.

Rule 19 was added by Ordinance No. XLVIII of 1983.

Order XIX

AFFIDAVITS

Rule–1: Power to order any point to be proved by affidavit.—Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

The power under this rule should be used in special circumstances and the reasons should always be specified in the order.

See also rule 43, C.R. & O.

Rule–2: Power to order attendance of deponent for cross-examination.—(1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

Exemption from personal appearance, see sections 81, 132, 133.

Rule–3: Matters to which affidavits shall be confined.—(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

Affidavits should clearly express how much is a statement of the declarant's knowledge and how much is a statement made on his information and belief and must also state the source or ground of the information or belief with sufficient particularity.

Padmabati -vs- Rasik, 37 C 259; Gobinda -vs- Kunja, 10 CLJ 414

See also rule 34, C.R. & O.

Order XX

JUDGMENT AND DECREE

Rule–1: Judgment when pronounced.—The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, not beyond seven days, of which due notice shall be given to the parties or their pleaders.

The words, "not beyond seven days," were added by Ordinance No. XLVIII of 1983.

"Pronouncing" does not require a reading out of the whole judgment.

Kutubuddin -vs- Golam, 94 IC 121

Definite date should be fixed for delivery of judgment if not pronounced immediately after conclusion of arguments and notice of such date should be given to the parties or their pleaders. Reserving a judgment without fixing a certain date is not permissible.

See rule 140, C.R. & O. and para 29 (4) Civil Suit Instruction Manual. See also rules 140-142, C.R. & O.

Rule–2: Power to pronounce judgment written by Judge's predecessor.—A Judge may pronounce a judgment written but not pronounced by his predecessor.

The words, "may pronounce" in this rule are not mandatory. Where a Judge wrote out a judgment, placed it upon record and was transferred, his successor who takes a different view may deliver his own judgment.

Lachman -vs- Ram, 33, A 236
Mg Ba -vs- Mg Ye. 76 IC 760

Rule–3: Judgment to be signed.—The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

See also rule 140, C.R.& O. and para 29 (5), Civil Suit Instructions Manual.

Judgment once signed alternation therein cannot be made except for rectifying clerical or arithmetical mistake arising from any accidental slip or omission.

See also para 29(6), Civil Suit Instructions Manual.

Rule–4: Judgments of Small Cause Courts.—(1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Judgments of other Courts.—(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

See also rules 138, 143, 144, 145, 146, 147, 148 and 153, C.R. & O.

Rule–5: Court to state its decision on each issue.—In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue.

The words after the words, "each separate issue", were omitted by Ordinance XLVIII of 1983.

Rule (5a) The decree shall be drawn up within seven days from the date of pronouncement of the judgment.

Rule–5(a) was inserted by Ordinance XLVIII of 1983

Rule–6: Contents of decree.—(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

See also rules 154-163, C.R. & O.

Rule–7: Date of decree.—The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

The date of the decree does not mean the date when the decree is reduced to writing and signed by the court, but the date on which the court delivered the judgment.

In re-Brenhilda -vs- B.I.S.N. Co. 7 C. 547 P.C

For purpose of appeal time runs from the date of pronouncement of judgment. The time required for copy excluded under section 12, Limitation Act, 1908.

Bene -vs- Matungini, 13 C 104

Forms of decrees in various kinds of suits, Forms Nos. 1-23, App. D, Sch. I = H. C. Forms Nos. (J) 25- (J) 35.

Form of notification of decree drawn up, H. C. Form No. (M) 5.

Rule–8: Procedure where Judge has vacated office before signing decree.—Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

Rule–9: Decree for recovery or immoveable property.—Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

For Form, Form No. 1, App. D, Sch. I = H.C. Form No. (J) 25.

Rule–10: Decree for delivery of moveable property.—Where the suit is for moveable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

In decrees for specific movable property, the court should state an amount to be paid in case of non-delivery. The decree holder has not the option not to take delivery of the property and to fall back on the money portion of the decree.

Balmukund -vs- B.N Ry, 55 C 26

As to suits for specific moveable property, see sections 10, 11, Specific Relief Act.

Rule–11: Decree may direct payment by instalments.—(1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

Order, after decree, for payment by instalments.—(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

This rule applies only to money decrees and not to mortgage decrees.

Hardeo -vs- Hukam, 2 A 320

Principles to be applied in granting instalments.

Manarama -vs- Wajaddi, 61 CLJ 93

Rule–12: Decree for possession and mesne profits.—(1)Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree–

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until-

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree,

whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

A suit decreed with a direction regarding an inquiry as to mesne profits is in the nature of a preliminary decree. The suit remains pending so long as a final decree is not passed under sub-rule (2).

Midnapure Zamindary Company, -vs- Naresh, 16 CWN 109
Rudra -vs- Sarda, 47 A 543
Shakar -vs- Gangaram, 52 B 360

Form of decree for recovery of land and mesne profits, H. C. Form No. (J) 29.

Rule–13: Decree in administration suit.—(1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree, ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

Forms of decree in administration suit, Forms Nos. 17-20, App. D, Sch. I.

Rule–14: Decree in pre-emption suit.—(1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall–

(a) specify a day on or before which the purchase-money shall be so paid, and

(b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause(a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,–

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule(1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and,

(b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

Rule–15: Decree in suit for dissolution of partnership.—Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

For of decree, Forms Nos. 21,22, App. D, Sch. I.

Rule-16: Decree in suit for account between principal and agent.—In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

See also rules 275 to 279, C. R. & O.

The rule is not restricted to suits for an account between a principal and an agent but applies to all suits on an account. Before directing an inquiry into accounts the court must be satisfied about the factum of the liability to render account and the necessity of taking accounts.

Bharat -vs- Kiran, 52 C 766

Rule–17: Special directions as to accounts.—The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

See also rule 276, C. R. & O.

Rule–18: Decree in suit for partition of property or separate possession of a share therein.—Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,–

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any Gazetted officer subordinate to the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

See also rule 274. C.R.& O.

Form of partition decree, App. C, C.R. & O. Vol. II, Page–409-410.

Rule–19: Decree when set-off is allowed.—(1) Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

Appeal from decree relating to set-off.—(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.

Rule–20: Certified copies of judgment and decree to be furnished.—Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

Strangers may also obtain copies of judgment, decrees or orders. See rule 525, C.R. & O.

For rules relating to certified copies, see chapter 24, C.R. & O.

Order XXI

EXECUTION OF DECREES AND ORDERS

Payment under decree

Rule–1: Modes of paying money under decree.—(1) All money payable under a decree shall be paid as follows, namely:–

(a) into the Court whose duty it is to execute the decree; or

(b) out of Court to the decree-holder; or

(c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given to the decree-holder.

Execution of decrees and orders should receive as much attention as original suits and appeals.

"All" does not imply the entire amount.

Tender of an amount under a decree by money order to the decree-holder is not valid but valid when addressed to the executing court. Payment out of court must be certified.

Ashutosh Roy Chowdhury -vs- Gunamian, 5 DLR 223

See also rules 167 and 168, 179 and 183 to 185, C.R. & O and para 35, Civil Suit Instructions Manual.

As to service of notice of payment of decretal amount into the court, see rule 181, C.R.& O.

For form of notice, H. C. Form No. (P) 19

Rule–2: Payment out of Court to decree-holder.—(1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after

service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.

An application for adjustment must be made within 90 days of payment or adjustment (see article 174, Limitation Act, 1908.)

See also rule 182, C.R.& O regarding certificate of payment out of court.

The rule applies to all kinds of decree. "Adjustment" is a transaction which extinguishes the decree in whole or in part and cannot mean an adjustment to give effect to the terms of which would be to create a new decree at variance with the decree under execution and which will again have to be executed.

Azizur -vs- Ali Raza, 32 CWN 434;
Deevendra -vs- Pradumnya, 62 C 28.

The words, "otherwise adjusted", are wide enough to cover an oral adjustment.

Anandapriya -vs- Bijoy, 1926 C 643

Form of notice to show cause why an adjustment or payment should not be recorded as certified, Form No. 1, App. E, Sch. I = H. C. Form No. (P) 20.

COURTS EXECUTING DECREES

Rule-3: Lands situate in more than one jurisdiction.—Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.

Rule–4: Omitted by A. O. 1949

Rule–5: Mode of transfer.—Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed .

See rule 230, C. R. & O.

Transferee court to return the decree if no execution application is made within six months.

See rule 231, C. R. & O.

Rule–6: Procedure where Court desires that its own decree shall be executed by another Court.—The Court sending a decree for execution shall send–

(a) a copy of the decree;

(b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and

(c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

There may be simultaneous execution. Court executing a decree may also send it to another court for execution.

Gurudas -vs- Jnanendra, 39 CWN 165

See rule 228, C.R. & O.
Form of order sending decree for execution to another court, Form No. 3, App. E, Sch. I = H. C. Form No. (J) 43.
Form of certificate of non-satisfaction of decree, Form No. 4. App. E, Sch, I = H. C. Form No. (J) 46.
Form of certificate of execution of decree transferred to another court, Form No. 5, App. E, Sch. I = H. C. Form No. (J) 44.

Rule–7: Court receiving copies of decree, etc. to file same without proof.—The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

The executing court is competent to refuse to execute the decree when on the face on it, it would appear that the court which passed it had no jurisdiction, territorial or pecuniary.

Gorachand -vs- Profulla, 53 C 166 FB

Rule–8: Execution of decree or order by Court to which it is sent.—Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

Rule–9: Execution by High Court Division of decree transferred by other Court.—Where the Court to which the decree is sent for execution is the High Court Division, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

For procedure of sending decree to High Court Division, see rule 229, C. R. & O.

APPLICATION FOR EXECUTION

Rule–10: Application for execution.—Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

Where application for execution was made to the court passing the decree, no fresh application need be made to the court to which the decree is transferred for execution.

Rule–11: Oral application.—(1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

Written application.—(2) Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:–

(a) the number of the suit;

(b) the names of the parties;

(c) the date of the decree;

(d) whether any appeal has been preferred from the decree;

(e) whether any, and (if any) what , payment or other adjustment of

the matter in controversy has been made between the parties subsequently to the decree;

(f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;

(g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;

(h) the amount of the costs (if any) awarded;

(i) the name of the person against whom execution of the decree is sought; and

(j) the mode in which the assistance of the Court is required, whether-

(i) by the delivery of any property specifically decreed;

(ii) by the attachment and sale , or by the sale without attachment, of any property;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise , as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

See also rules 167, 168, 169, 170,171, 172 and 187, C. R. & O and also para 35, Civil Suit Instructions Manual.

For Form of decree under sub-rule (1), see H. C. Form No. (J) 27.

Form of application for execution, Form No. 6, App. E, Sch. I = H. C. Form No. (J) 47.

Rule–12: Application for attachment of moveable property not in judgment-debtor's possession.—Where an application is made for the attachment of any moveable property belonging to a judgment –debtor but not in his possession, the decree–holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

No inventory is necessary when decree is executed under section 52 against legal representative.

Birdichand -vs- Badesaheb, 1927 B. 52.

Rule–13: Application for attachment of immoveable property to contain certain particulars.—Where an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it shall contain at the foot–

(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and

(b) a specification of the judgment –debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

Rule–14: Power to require certified extract from Collector's register in certain cases.—Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.

Rule–15: Application for execution by joint decree-holder.—(1) Where a decree has been passed jointly in favor of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

See also rule 175, C. R. & O.

Under this rule a person claiming under decree holder, i. e. a person within the meaning of Order 21, rule 16 of the Code may also apply for execution.

Dwar -vs- Fatik 26 C 250

A joint decree cannot be executed by one of the decree-holders in respect of his share only unless the decree specifically determines the extent of the share of each decree-holder.

Hurrish -vs- Kalisundari, 9 C 482 PC

Rule–16: Application for execution by transferee of decree.— Where a decree or, if a decree has been passed jointly in favor of two or more persons, the interest of any decree- holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree – holder:

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and until the Court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferrer admitting the transfer or an instrument of transfer duly registered be filed, the Court may proceed with the execution of the decree pending the hearing of such objections:

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against others.

The words, "and until the court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferrer admitting the transfer or an instrument of transfer duly registered be filed, the Court may proceed with the execution of the decree pending the hearing of such objections:" in the first proviso were substituted for the words, "and the decree shall not be executed until the Court has heard their objections (if any) to its execution," by rule made by the Calcutta High Court under section 122 vide Notification No. 3516 G dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February, 1933 Part-I, Page-245.

In this rule, "transfer by operation of law" means transfer on death or by devolution or by succession e. g. legal representative of deceased decree – holder, official assignee in the case of an insolvent decree-holder, or the purchaser of a decree at a court sale in execution of a decree against the decree –holder.

Gour -vs- Hem. 16 C. 355

Where a decree-holder dies pending execution the legal representative can not apply for substitution but he may apply immediately for carrying on the execution proceeding or he may apply for fresh execution, in which case his name may be brought on record.

Akhoy -vs- Surendra , 30 CWN 385; Sailendra -vs- Surendra 34 CWN 437; Manmatha -vs- Rakhal ; 10 CLJ 396; Jogendra -vs- Shyam 36 C 543

Rule–17: Procedure on receiving application for execution of decree.—(1) On receiving an application for execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court shall allow the defect to be remedied then and there or within a time to be fixed by it. If the defect is not remedied within the time fixed the Court may reject the application.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application:

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

The words, "the Court shall allow the defect to be remedied then and there or within a time to be fixed by it. If the defect is not remedied within the time fixed the Court may reject the application," in sub-rule (1) were substituted for the words, "the count may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it", by rule made by the Calcutta High Court under section 122 vide Notification No. 3516 G dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February, 1933, Part-I, Page-245.

A defective execution application can not be rejected without giving an opportunity to remedy the defect.

See also rules 170-174, C. R. & O and para 35, Civil Suit Instructions Manual.

Rule–18: Execution in case of cross decrees.—(1) Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then–

(a) if the two sums are equal, satisfaction shall be entered upon both decrees ; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction of the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment- debts due by the original assignor as in respect of judgment- debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless–

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment–debtor in the other and each party fills the same character in both suits; and

(b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

ILLUSTRATIONS

(a) A holds a decree against B for Taka 1,000. B holds a decree against A for the payment of Taka 1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this rule.

(b) A and B, co-plaintiffs, obtain a decree for Taka 1,000 against C, and C obtains a decree for Taka 1,000 against B. C cannot treat his decree as a cross – decree under this rule.

(c) A obtains a decree against B for Taka 1,000. C who is a trustee for B, obtains a decree on behalf of B against A for Taka 1,000. B cannot treat C's decree as a cross-decree under this rule.

(d) A, B, C, D and E are jointly and severally liable for Taka 1,000 under a decree obtained by F. A obtains a decree for Taka 100 against F singly and applies for execution to the Court in which the joint decree is being executed. F may treat his joint-decree as a cross –decree under this rule.

In order that this rule may apply, applications for execution must be made by both persons. If one decree-holder only applies, execution must proceed for the full amount and there cannot be any set – off.

Chajmal -vs- Dharam, 24 A 481

This rule is applicable to cross-decrees and not to cross claims. As to cross-claims, see Or. 21 r. 19

Rule–19: Execution in case of cross-claims under same decree.— Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,–

(a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and

(b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

This rule applies to cross- claims under one decree. The decree-holder is entitled to execute the difference between the amount recoverable by him and the amount which the judgment-debtor is entitled to recover against him.

Giribala -vs- Mina Kumari 5 CWN 497

The party entitled to the smaller sum can not take out execution.

Madappa -vs- Jaki, 40, B 60

Rule–20: Cross-decrees and cross-claims in mortgage suits.— The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of mortgage or charge.

Rule–21: Simultaneous execution.—The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

Rule–22: Notice to show cause against execution in certain cases.—(1) Where an application for execution is made–

(a) more than two years after the date of the decree, or

(b) against the legal representative of a party to the decree, or where an application is made for execution of a decree filed under the provisions of section 44A,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than two years having elapsed between the date of the decree and the application for execution if the application is made within two years from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(3) Omission to issue a notice in a case where notice is required under sub-rule (1), or to record reasons in a case where notice is dispensed with under sub-rule(2), shall not affect the jurisdiction of the Court in executing the decree.

(4) No order of execution of the decree shall be invalid by reason of the omission to issue a notice under sub-rule (1) or to record reasons in a case where notice is dispensed with under sub-rule(2) unless the judgment-debtor has sustained substantial injury by reason of such omission.

Sub-Rule (3) was added by rule made by the Calcutta High Court under section 122 vide Notification No. 3516-G, dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February, 1933 Part-I, Page 245. Subsequently, the additional sub-rule (3) was added by Ordinance No. XLVIII of 1983 and for the sake of convenience, it is shown in this book as sub-rule (4).

It appears that the objects of sub-rules (3) and (4) are similar. Having overlooked the existence of sub-rule (3), sub-rule (4) numbering it as sub-rule (3) was enacted by Ordinance No. XLVIII of 1983.

In this rule the words, "one year", wherever occurring were substituted by the words, "two years", by Ordinance XLVIII of 1983

Rule–23: Procedure after issue of notice.—(1) Where the person to whom notice is issued under the last proceeding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

PROCESS FOR EXECUTION

Rule–24: Process for execution.—(1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed, and a day shall also be specified on or before which it shall be returned to the Court.

In sub-rule (3) the words, "and a day shall also be specified on or before which it shall be returned to the Court," were added by rule made by the Calcutta High Court under section 122 vide Notification No. 3516-G dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February, 1933 Part-I, Page-245.

Processes of attachment of movables, delivery of possession and warrant of arrest should be signed by the Judge himself.

See rule 177, C.R.& O.

The officer to whom a process is delivered for execution may delegate it to his subordinate for execution.

Sheo Progash -vs- Bhup, 22 C 759;
Abdul -vs- Bullen, 6A 385;
Jagannath -vs- E, 1932 A 227

Rule–25: Endorsement on process.—(1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the

process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

"The officer entrusted with the execution" is the peon who actually executes and not the nazir. The peon executing derives his authority from the court and not from the nazir who delegates.

Subed -vs- E, 40 C 849

STAY OF EXECUTION

Rule–26: When Court may stay execution.—(1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

Power to require security from, or impose conditions upon judgment-debtor.—(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court shall require security from the judgment-debtor unless sufficient cause is shown to the contrary.

The words "the Court shall require security from the judgment-debtor unless sufficient cause is shown to the contrary," were substituted for the words, "the Court may require such security from, or impose such condition upon, the judgment-debtor as it think fit", by rule made the Calcutta High Court under section 122 vide Notification No. 3516-G dated the 3rd

February, 1933 published in the Calcutta Gazette dated the 9th February 1933 Part-I, Page-245.

An order for stay cannot be made under this rule on the application of a decree-holder.

Allah -vs- Karam 1931, L 690

Rule–27: Liability of judgment-debtor discharged.—No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution.

Rule–28: Order of Court which passed decree or of appellate Court to be binding upon Court applied to.—Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

Rule–29: Stay of execution pending suit between decree-holder and judgment-debtor.—Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

The rule is applicable to the holder of a decree of a court in which the suit is pending.

Inayet -vs- Umrao, 1930, A 121

The words, "until the pending suit has been decided," mean until the claim in the pending suit has been finally decided up to the final appellate stage.

Mohesh -vs- Jogendra, 55, C 512
Contrary view, Radha -vs- Pyari, 58 C 1113

The former is preferred.

But, the contrary view has been taken in *Tarak N. Sen -vs- Kartick Ch. Sen,* 12 DLR 327.

When the court is satisfied that in the interest of justice stay of execution of a decree should be allowed, it shall stay execution on the terms as to security of the decree-holder's interest.

Mannujan Begum -vs- Abdus Samad, 29 DLR (SC) 233

MODE OF EXECUTION

Rule–30: Decree for payment of money.—Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

Court may refuse simultaneous execution against person and property.
Form of attachment of moveable property, Form No. 8, App. E, Sch. I = H. C. Form No. (P) 24.

Rule–31: Decree for specific moveable property.—(1) Where the decree is for any specific moveable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-rule(1) has remained in force for three months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of three months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

The words, " three months," were substituted for the words, "six months," in sub-rules (2) & (3) by rule made by the Calcutta High Court under section 122 vide Notification No. 3516-G, dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February, 1933 Part-I, Page-245.

This rule is not applicable where the property sought to be attached is not in the possession of the judgment-debtor e.g. with the Bank.

Pudmanand -vs- Chundi 1 C.W.N. 170

Rule–32: Decree for specific performance, for restitution of conjugal rights, or for an injunction.—(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for three months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

ILLUSTRATION

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B.A, in spite of his detention

in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realisable by the sale of A' s property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the court to remove the building and may recover the cost of such removal from A in the execution –proceedings.

The words, "three months," in sub rule (3) were substituted for the words, "one year," by rule made by the Calcutta High Court under section 122 vide Notification No. 3516-G dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February, 1933, Part-1, Page-245.

Execution of decree for restitution of conjugal rights can be effected only by attachment of the property of the husband or wife, as the case may be, against whom the decree is passed.

Imam Sharif -vs- Abdul Mannan, 4 DLR 617

Possession can be granted by the executing court in a decree for specific performance of contract to sell as it is incidental to execution of document of sale.

Maksud Ali -vs- Eskandar, 28 DLR (SC) 100

The remedy provided in Order 21, rule 32 (5) is not available when a prohibitory order of injunction is violated.

Moyna Mia -vs- Hazi Abdus Samad, 33 DLR 207

Sub-rule (5) applies only to mandatory injunctions.

Hemchandra -vs- Narendra, 38 CWN 101

Rule–33: Discretion of Court in executing decrees for restitution of conjugal rights.—(1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree against a husband for the restitution of conjugal rights or at any time afterwards, may order that the decree shall be executed in the manner provided in this rule.

(2) Where the Court has made an order under sub-rule (1), it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering

the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

This rule applies to a decree for restitution of conjugal rights against a husband.

Rule–34: Decree for execution of document, or endorsement of negotiable instrument.—(1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely:–

"C.D, Judge of the Court of (or as the case may be), for A. B., in a suit by E.F. against A. B."

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of

the expenses of the registration.

Form of notice to state objections to draft of document, Form No. 10, App. E, Sch. I.

Rule–35: Decree for immoveable property.—(1) Where a decree is for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immoveable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

Sub-rules (1) and (3) refer to actual khas possession and sub-rule (2) refers to symbolical possession.

By executing a decree for possession of vacant land the court has no power to deliver possession by demolition of structures standing thereon.

Md. Mokrram Ali Laskar -vs- Sekandarul Islam, 17 DLR 673;
Md. Islam -vs- Munshi Abdul Rahman, 6 DLR 81

Form of warrant to bailiff to give possession of land, Form No. 11, App. E, Sch. I = H.C. Form No. (P) 23.

Rule–36: Decree for delivery of immovable property when in occupancy of tenant.—Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

ARREST AND DETENTION IN THE CIVIL PRISON

Rule–37: Discretionary power to permit judgment-debtor to show cause against detention in prison.—(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court shall, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:

Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

Form of notice to show cause, Form No. 12, App. E, Sch I = H. C. Form No. (P) 25.

Rule–38: Warrant for arrest to direct judgment-debtor to be brought up.—Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the cost (if any) to which he is liable, be sooner paid.

Form of warrant of arrest, Form No. 13, App. E, Sch I = H. C. Form No. (P) 26.

Rule–39: Subsistence allowance.—(1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

See also rules 174,222, 223, and note to rule 226, C.R. & O.

In sub-rule (5), the words, "in the civil prison," which occurred after the words, "judgment debtor," were omitted by rule made by the Calcutta High Court under section 122 vide Notification No. 3516-G dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February, 1933 Part-1, Page. 245.

Rule–40: Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.—(1) When a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.

(2) Pending the conclusion of the inquiry under sub-rule (1) the Court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required.

(3) Upon the conclusion of the inquiry under sub-rule (1) the Court may, subject to the provisions of section 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) When the Court does not make an order of detention under sub-rule (3), it shall disallow the application and, if the judgment-debtor is under arrest, direct his release.

This rule was substituted for the old rule by the Code of Civil Procedure (Amendment) Act., 1936 (XXI of 1936).

The object of this rule is that judgment-debtors will not be sent to prison as a matter of course merely because he is unable to pay his debt or at the option of the decree-holder exercised out of spite but to afford protection to debtors who are incapable of paying their debts by reason of poverty and who have not committed any act of bad faith.

The effects of the rule may be summarised as follows:–

First, the court shall issue a notice under Order 21, rule 37(1) to show cause against detention in prison unless notice is dispensed with under the proviso to the rule. Where the judgment-debtor does not appear to show cause, the court shall issue a warrant, if the decree-holder so requires. When the judgment-debtor appears or when he is brought under arrest the court will proceed to make an inquiry under this rule as to whether it is a fit case for the sending of the judgment-debtor to prison. The decree-holder shall tender such evidence as he may be in possession of in support of his application and the judgment-debtor shall then be heard and any evidence that he may give against the application shall be taken. In deciding whether detention in prison should or should not be ordered, the court shall apply the tests provided in provisos (a), (b) and (c) of section 51 and no judgment-debtor shall be sent to prison unless the court is satisfied that any of the conditions detailed in the proviso to that section exists. Before ordering detention in prison, the court may give the judgment-debtor time not exceeding fifteen days for satisfaction of the decree. Pending the inquiry, the judgment-debtor may be discharged on furnishing security.

Where the decree-holder sought to arrest one judgment-debtor who was unable to pay instead of proceeding against the others who were able to pay the court rejected the application for arrest.

Lala -vs- Mina, 1922 L 259

Form of warrant of committal of judgment-debtor to civil prison, Form No. 14, App. E, Sch. I = H. C. Form No. (P) 27.

ATTACHMENT OF PROPERTY

Rule–41: Examination of judgment-debtor as to his property.— Where a decree is for the payment of money the decree-holder may apply to the Court for an order that–

(a) the judgment-debtor, or

(b) in the case of a corporation, any officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

Rule–42: Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.— Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Rule–43: Attachment of moveable property other than agricultural produce, in possession of judgment-debtor.—Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and, save as otherwise prescribed, the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that, when the property seized does not, in the opinion of the attaching officer, exceed twenty rupees in value or is subject to speedy and natural decay, or when the expense of keeping in custody is likely to exceed its value, the attaching officer may sell it at once.

This rule was substituted for the old rule by rule made by the Calcutta High Court under section 122 vide Notification No. 25585-G, dated the 3rd November, 1933 published in the Calcutta Gazette dated the 9th November, 1933 Part-1, Page-1617.

See also rules 189-195, 201, and 209, C.R.& O.

Procedure to be followed when property falls within the proviso, see rules 193, 201 and 209, C.R. & O.

Rule–44: Attachment of agricultural produce.—Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,–

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

As to exemption of agricultural produce from attachment, see section 61.

Rule–45: Provisions as to agricultural produce under attachment.—(1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

The words, "and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time," occurring in sub-rule (1) were added by rule made by the Calcutta High Court under section 122 vide Notification No. 3516-G, dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February 1933, Part-1, Page 245.

Rule–46: Attachment of debt, share and other property not in possession of judgment-debtor.—(1) In the case of–

(a) a debt not secured by a negotiable instrument,

(b) a share in the capital of a corporation,

(c) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting;–

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of he Court;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the court- house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

Forms of prohibitory order, Forms Nos. 16, 17, 18, App. E, Sch. I = H. C. Forms Nos. (P) 29, (P) 30, (P) 31.

GARNISHEE ORDERS

Rule–46(A):.—The Court may in case of a debt, other than a debt secured by a mortgage or a charge or by a negotiable instrument, which has been attached under rule 46 or 51 of this Order, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt calling upon him either to pay into Court the debt due from him to the judgment- debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so:

Provided that if the debt in respect of which the application aforesaid is made is in respect of a sum of money beyond the pecuniary jurisdiction of the Court, the Court shall send the execution case to the Court of the District Judge to which the said Court is subordinate, and thereupon the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge will deal with it in the same manner as if the case had been originally instituted in that Court.

Such application shall be made on affidavit verifying the facts alleged and stating that in the belief of the deponent the garnishee is indebted to the judgment –debtor.

Rule–46(B): Where the garnishee does not forthwith pay into Court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

Rule–46(C): Where the garnishee disputes liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, and upon the determination of such issue shall make such order or orders upon the parties as may seem just.

Rule–46(D): Where it is suggested or appears to be probable that the debt belongs to some third person or that any third person has a lien or charge on, or other interest in, such debt, the Court may order such third person to appear and state the nature and particulars of his claim (if any) to such debt and prove the same.

Rule–46: (E)—After hearing such third person and any other person or persons who may subsequently be ordered to appear, or where such third or other person or persons do not appear when so ordered, the Court may make such order as is hereinbefore provided, or such other order or orders upon such terms, if any, with respect to the lien, charge or interest if any of such third or other person as may seem fit and proper.

Rule–46(F): Payment made by the garnishee on a notice under rule 46 (A) or under any such order as aforesaid shall be valid discharge to him as against the judgment –debtor and any other person ordered to appear as aforesaid for the amount paid or levied although such judgment may be set aside or reversed.

Rule–46(G): The costs of any application made under rule 46 (A) and of any proceeding arising therefrom or incidental thereto, shall be in the discretion of the Court.

Rule–46(H): An order made under rules 46(B), 46(C) or 46(E) shall be appealable as a decree.

Rules–46(A) to 46(H) were added by rule made by the Calcutta High Court under section 122 vide Notification No. 1854-G dated the 26th January 1935 published in the Calcutta Gazette dated the 31st January, 1935 Part-I, Page. 290.

Rule–47: Attachment of share in moveables.—Where the property to be attached consists of the share or interest of the judgment –debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

Share or interest in movable property is incapable of actual seizure. Attachment of share or interest in movable property can only be made by prohibiting the judgment-debtor from transferring the share or interest or charging it in any way.

Rajendra -vs- District Board, 59 C 808

Rule–48: Attachment of salary or allowances of public officer or servant of railway or local authority.—(1)Where the property to be attached is the salary or allowances of a servant of the Republic or of a servant of the railway or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as the Government may by notification in the official Gazette appoint in this behalf,–

(a) where such salary or allowances are to be disbursed within the local limits to which this Code for the time being extends, the officer or other person whose duty it is to disburse the same shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be;

(b) where such salary or allowances are to be disbursed beyond the said limits, the officer or other person within those limits whose duty it is to instruct the disbursing authority regarding the amount of the salary or allowances to be disbursed shall remit to the Court the amount due under the order, or the monthly instalments, as the case may be, and shall direct the disbursing authority to reduce the aggregate of the amounts from time to time to be disbursed by the aggregate of the amounts from time to time remitted to the Court.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind the Government or the railway or local

authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of the revenues of the Government or the funds of the railway or local authority in Bangladesh; and the Government or the railway or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

This rule is an exception to the general rule that the court has no jurisdiction to attach property outside its local jurisdiction. This rule is applicable also to a court to which a decree is transferred for execution.

Form of order of attachment, Form No. 19, App. E, Sch I = H. C. Form No. (P) 32.

Rule–49: Attachment of partnership property.—(1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within Bangladesh.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment –debtor, and on such of the other partners as do not join in the application and as are within Bangladesh.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

Sale of partnership property in execution of a money decree against one partner is invalid.

Rati -vs- Uttam, 1933 C 275
Ravi -vs- Uttam, 60 CLJ 464

Rule–50: Execution of decree against firm.— (1) Where a decree has been passed against a firm, execution may be granted–

(a) against any property of the partnership;

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(c) against any person who has been individually served as a partner with a summons and has failed to appear:

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

Rule–51: Attachment of negotiable instruments.—Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual

seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

Form of order of attachment, Form No. 20, App. E, Sch I = H. C. Form No. (P) 33.

Rule–52: Attachment of property in custody of Court or public officer.—Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued:

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

This rule does not allow an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to money actually in his hands.

Tulaji -vs- V. Balabhai, 22 B 39
Thakurdas -vs- Joseph, 44 C. 1072

The rule also applies to property in the hands of the same court which executes the decree.

Surajmall -vs- Ramchandra 20 CWN 412

Form of prohibitory order, Form No. 21, App. E, Sch. I=H.C Form No. (P) 34.

Rule–53: Attachment of decrees.—(1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,–

(a) if the decrees were passed by the same Court, then by order of such Court, and

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court and to any Court to which it has been transferred for execution of a notice by the Court which passed the decree sought to be executed, requesting such other Court or Courts to stay the execution of its decree unless and until–

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute the attached decree with the consent of the said decree-holder expressed in writing or the permission of the attaching Court.

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified sub-rule(1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court and to any Court to which it has been transferred for execution a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of the said order with knowledge thereof, either through the Court or otherwise, shall be recognised by any Court so long as the attachment remains in force.

The words, "and to any Court to which it has been transferred for execution", and, "or Courts," occurring in clause (b) of sub rule (1), "to execute the attached decree with the consent of the said decree-holder

expressed in writing or the permission of the attaching Court," occurring in sub head (ii) of clause (b) of sub-rule (1) "and to any Court to which it has been transferred for execution," occurring in sub rule (4), and, "in contravention of the said order with knowledge thereof," occurring in sub-rule (6) were inserted, by rule made by the Calcutta High Court under section 122 vide Notification No. 3516-G dated the 3rd February, 1933, published in the Calcutta Gazette dated the 9th February, 1933 Part-1, Page-245 . In sub-rules (1) and (4) the words, "and to any Court to which the decree has been transferred for execution," were substituted for the words, "to execute its own decree," and in sub-rule (6) the words, "in contravention of the said order with knowledge thereof," were substituted for the words, "in contravention of such order after receipt of notice thereof."

Decrees for the payment of money or for sale in enforcement of a mortgage or charge are attached in the manner prescribed in sub-rule (1) and such attached decrees are realised in the manner prescribed in sub-rule (2) i.e. by execution. Other decrees are attached in the manner prescribed by sub-rule (4) and such attached decrees are realised by the sale of the decrees themselves.

Attachment of decree does not operate as a stay of execution of the decree.

K.B. Haji Badi Ahmed Chowdhury -vs- Amiruzzaman, 3 DLR (FB) 254

Form of notice of attachment under this rule, Form No. 22, App. E, Sch I = H. C. Form No. (P) 35

Form of notice of attachment under sub-rules (4) and (6), Form No. 23, App. E, Sch. I = H. C. Form No. (P) 36.

Rule–54: Attachment of immoveable property.—(1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

(3) Such order shall take effect, where there is no consideration for such transfer or charge, from the date of the order, and where there is consideration for such transfer, or charge, from the date when such order

came to the knowledge of the person to whom or in whose favour the property was transferred or charged, or from the date when the order is proclaimed under sub-rule (2) whichever is earlier.

Sub-rule (3) was inserted by rule made by Calcutta High Court under section 122 of the Code Vide Notification No. 3516-G dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February 1933, Part-1, Page-245. See also rule 187, C.R. & O. Vol-1.

Form of prohibitory order under sub-rule (1), Form 24, App. E, Sch. I= H. C. Form No. (P) 39.

Rule–55: Removal of attachment after satisfaction of decree.— Where–

(a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

(c) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last proceeding rule.

Rule–56: Order for payment of coin or currency notes to party entitled under decree.—Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

Form of order under this rule, Form No. 25, App. E, Sch. I = H. C. Form No. (P) 37.

Rule–57: Determination of attachment.—Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease unless the Court shall make an order to the contrary.

The words, "unless the Court shall make an order to the contrary," were added by rule made by the Calcutta High Court under section 122 vide Notification No. 3516-G dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February 1933 Part-1, Page-245.

This rule does not apply to attachment before the judgment.

Ganesh -vs-. Banwary, 16 CLJ-86
Shibnath -vs- Sheikh, 56 C 416
Md. Fulari Miah –vs- Benode Behari Roy, 18 DLR 39

Or. 21, r. 57 was intended to put a stop to the practice of "striking off" execution proceedings or "removing" them from file which led to doubts as to its effect on attachment. Under this rule if there is any default, execution cases must be "dismissed" and not "struck off". No restricted meaning should be given to the word "default". It includes a failure to do what the decree-holder is bound to do, that is, to proceed with the application for execution.

Namuna -vs- Rosha, 38 C 482

INVESTIGATION OF CLAIMS AND OBJECTIONS

Rule–58: Investigation of claims to, and objections to attachment of, attached property.—(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

Postponement of Sale–(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection upon such terms as to security, or otherwise, as to the Court shall seem fit.

The words, "upon such terms as to security, or otherwise, as to the Court shall seem fit", occurring in sub-rule (2) were added by rule made by the Calcutta High Court under section 122 vide Notification No. 3516-G dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February 1933 Part-1, Page-245.

See also para 35(3) and (10), Civil Suit Instructions Manual.

An inquiry under this rule relates to possession and has no relation to the question of title.

Mir Laike Ali -vs- Standard Vacuam Oil Company, 16 DLR (SC) 287

Form of notice to attaching creditor, Form No. 26, App. E, Sch. I =H. C. Form No. (P) 38.

Rule–59: Evidence to be adduced by claimant.—The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

"Some interest" means such interest as would make the possession of the judgment-debtor, possession not on his account but on account of, or in trust for the claimant.

Mohunt -vs- Khetter, 1 CWN 617

Where claimant alleges possession on his own account and decree-holder says that he is a benamdar of the judgment-debtor, the property should be released, as benami is a question of title.

Monmohiny -vs- Radha, 29 C 543

Rule–60: Release of property from attachment.—Where upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

Where it is found that the claimant is in possession of half share and the judgment-debtor is entitled to the other half and the property is attached under Or. 21 r. 43 it should be released and the decree-holder may then proceed under Or. 21 r. 47.

Rajendra -vs- District Board, 59 C 808

Rule–61: Disallowance of claim to property attached.—Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

An order in favour of a decree-holder does not enure for the benefit of other decree-holders who are not parties to the proceeding.

Jagannath -vs- Ganesh, 18 A 413

Rule–62: Continuance of attachment subject to claim of incumbrancer.—Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

In view of this rule the court being satisfied as to the existence of a mortgage, the property is sold subject to such mortgage i.e. the judgment-debtor's equity of redemption is sold.

Kalidas -vs- Prasanna, 47C. 446
Shah -vs- Kailash, 2 CLJ 599

Rule–63: Omitted by Ordinance XLVIII of 1983.

Rule–63 A When an attachment of moveable property ceases the Court may order the restoration of the attached property to the person in whose possession it was before the attachment.

This rule was added by rule made by the Calcutta High Court under section 122 vide Notification No. 25585-G dated the 3rd November, 1933 published in Calcutta Gazette dated the 9th November, 1933, Part-1, Page-1617.

SALE GENERALLY

Rule–64: Power to order property attached to be sold and proceeds to be paid to person entitled.—Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

See also rules 187 and 188, C.R. & O.

If the property is sold without attachment in execution of a decree, the sale will not be invalid. The omission to attach the property before sale is only an irregularity and will not vitiate the sale.

Naresh -vs- Mollah, 57, C 1206

Where a property has been sold in execution of a decree it cannot be sold again at the instance of another decree-holder who had effected a prior attachment.

Kashy -vs- Sarbanant, 12 C 317

Rule–65: Sales by whom conducted and how made.—Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

See also rules 205-207, C.R. & O.

Rule–66: Proclamation of sales by public auction.—(1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible–

(a) the property to be sold;

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

(c) any incumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner herein-before prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub rule(2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

Value of the property must be stated as fairly and accurately as possible.
Saadatmand vs- Phulkuar, 20 A 412 PC

See also rule 200-201, C.R.& O.

Form of order for causing service of sale proclamation, Form No. 30, App. E, Sch. I = H. C. Form No. (P) 41.

Form of notice of the day fixed for settling sale proclamation, Form No. 28, App. E, Sch. I = H. C. Form No. (P) 42.

Form of warrant of sale of property in execution of decree for money, Form No. 27, App. E, Sch. I = H. C. Form No. (P) 43.

Form for proclamation of sale of immoveable property, Form No. 29, App. E, Sch. I = H. C. Form No. (P) 44.

Form for proclamation of sale for moveable property, H. C. Form No. (P) 45.

Rule–67: Mode of making proclamation.— (1)Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

(2) Where the Court so directs, such proclamation shall also be published in the official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

Rule–68: Time of sale.—Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the court-house of the Judge ordering the sale.

See also rules 200,201,204, 205, 208 and 209, C.R. & O.

Rule–69: Adjournment or stoppage of sale.—(1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment:

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than thirty days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

The words, "thirty days," in sub-rule (2) were substituted by Ordinance No. XLVIII of 1983. Before the substitution the words, "one calendar month", were inserted substituting the words, "seven days", by rule made by the Calcutta High Court under section 122 vide Notification No. 3516-G dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February, 1933 Part-1, Page-245.

See also rules 202-207, C.R. & O.

Rule–70: Saving of certain sales.—Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

Rule–71: Defaulting purchaser answerable for loss on re-sale.—Any deficiency of price which may happen on a resale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

This rule extends to all sales whether of movable or immovable property and also to re-sales made under Or. 21, rr. 84-86.

Ramdhani -vs- Rajrani, 7 C 337
Rajendra -vs- Ram, 2 CWN 411

Form of certificate, Form No. 31, App. E, Sch I = H. C. Form No. (M) 24.

Rule–72: Decree-holder not to bid for or buy property without permission.—(1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

Where decree-holder purchases, amount of decree may be taken as payment.—(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly,

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

Decree-holder is bound to have express permission.

Rukmini -vs- Brojonath, 5 C 308

Leave may be subject to the condition that the highest bid shall not be lower than the decretal amount.

Sylhet C. T. Bank vs- Rasik, 39 CWN 1293

See also section 136, Transfer of Property Act.

Where a decree-holder purchases without leave the remedy is by an application under this rule.

Genu -vs- Sakharam, 22 B 271;
Durga -vs- Balwant, 23 A 478

Decree-holder purchases without court's permission-sale not void but avoidable.

Jnannendra Sundari -vs- Narayan Ch. Sardar, 7 DLR 627
Sylhet C.T. Bank -vs- Rasik, 39 CWN 1293

See also rule 207, C.R. & O.

Rule–73: Restriction on bidding or purchase by officers.—No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to

acquire any interest in the property sold.

See also section 136, Transfer of Property Act, 1882

SALE OF MOVEABLE PROPERTY

Rule–74: Sale of agricultural produce.—(1) Where the property to be sold is agricultural produce, the sale shall be held,–

(a) if such produce is a growing crop, on or near the land on which such crop has grown, or,

(b) if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited:

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale,–

(a) a fair price, in the estimation of the person holding the sale, is not offered for it , and

(b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market – day,

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

See also rules 208 and 209, C. R. & O.

Rule–75: Special provisions relating to growing crops.—(1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not admit of being stored or can be sold to greater advantage in an unripe state(e.g. as green wheat), it may be sold before it is cut and gathered , and the purchaser shall be entitled to enter on the land , and to do all that is necessary for the purpose of tending or cutting or gathering it.

The words, "or can be sold to greater advantage in an unripe state"(e. g. as green wheat)," occurring after the words, "Where the crop from its nature does not admit of being stored," and the word, "or", occurring after the words, "and to do all that is necessary for the purpose of tending", were inserted by rule made by the Calcutta High Court under section 122 vide Notification no.3516-G dated the 3rd February 1933 published in the Calcutta Gazette dated the 9th February'1993, Part-1, Page-245.

See also rule 208, C. R. & O.

Rule–76: Negotiable instruments and shares in corporation.—Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker.

Rule–77: Sale by public auction.—(1). Where moveable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold.

(2) On payment of the purchase- money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the moveable property to be sold is a share in goods belonging to the judgment- debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

Rule–78: Irregularity not to vitiate sale, but any person injured may sue.—No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

This rule prohibits the setting aside of a sale of movable property on the ground of irregularity.

Baijnath -vs- Benoyendra, 6 CWN 5

Rule–79: Delivery of moveable property, debts and shares.—(1) Where the property sold is moveable property of which actual seizure has been made, it shall be delivered to the purchaser.

(2) Where the property sold is moveable property in the possession of some person other than the judgment- debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.

A purchaser at a court-sale of shares in a limited company is not entitled as of right to have his name entered in the Register. He is in the same position as a private purchaser.

Manilal -vs- G.S. Q M. Co. 41 B 76

Form of notice to person under sub-rule (2), Form No. 32, App. E, Sch. I.

Form of prohibitory order against payment of debt, Form No. 33, App. E, Sch. I = H. C. Form No. (P) 46.

Form of prohibitory order against transfer of shares, Form No. 34, App. E, Sch. I.

Rule–80: Transfer of negotiable instruments and shares.—(1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

(2) Such execution or endorsement may be in the following form, namely:–

A. B. by C. D, Judge of the Court of (or as the case may be), in a suit by E.F. against A. B.

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same ; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

Rule–81: Vesting order in case of other property.—In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

SALE OF IMMOVEABLE PROPERTY

Rule–82: What Courts may order sales.—Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

Rule–83: Postponement of sale to enable judgment–debtor to raise amount of decree.—(1) Where an order for the sale of immoveable property has been made, if the judgment debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment – debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

(2) In such case the Court shall grant a certificate to the judgment-debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale:

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court:

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property;

The postponement under this rule is discretionary.

Bishenmun -vs- L.M. Bank, 11 C 244 PC

Form of certificate to judgment-debtor authorising him to mortgage, lease or sell property, Form No. 35, App. E, Sch. I = H. C. Form No. (J) 48.

Rule–84: Deposit by purchaser and re-sale on default.—(1) On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold.

(2) Where the decree-holder is the purchaser and is entitled to set off the purchaser-money under rule 72, the Court may dispense with the requirements of this rule.

An execution sale does not become complete before the bid is accepted by the court and the purchaser is declared under this rule.

Surendra -vs- Manmatha, 58 C 788

The nazir is only a recorder of bids and his function is purely ministerial.

Surendra -vs- Manmatha, 58 C 788

See also rule 205, note 3, C.R. & O.

Court has discretion to accept or not to accept any bid.

See rule, 206, C.R. & O.

Rule–85: Time for payment in full of purchase money.—The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property;

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

If the Court is closed, payment on the next open day is good payment.

Peary -vs- Anunda, 18 C 631
Surendra –vs- Sauravini, 10 CWN 535

See also section 10,General Clauses Act, 1897 (Act X of 1897).

This rule confers a discretion on the court to refund the deposit or a portion of it, if proper cause is shown.

Rule–86: Procedure in default of payment.—In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

Rule–87: Notification on re-sale.—Every re-sale of immovable property in default of payment of the purchase money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

This rule does not apply when a property is sold forthwith under Or. 21 r. 84

Rajendra -vs- Ram, 2 CWN 411

Rule–88: Bid of co-sharer to have preference.—Where the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

Rule–89: Application to set aside sale on deposit.—(1) Where immovable property has been sold in execution of a decree, any person, whose interest is affected by such sale (provided that such interest has not been voluntarily acquired by him after such sale), may apply to have the sale set aside on his depositing in Court,–

(a) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

The words, "whose interest is affected by such sale (provided that such interest has not been voluntarily acquired by him after such sale)," in sub-rule (1) were substituted for the words, "either owning such property or holding an interest therein by virtue of a title acquired before such sale," by rule made by Calcutta High Court under section 122 vide Notification No. 3516 -G dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February, 1933 Part–I, Page–245.

The application and deposit must be made within 30 days from the date of the sale. Article 166, Limitation Act, 1908.

If the court be closed on or before the last day of deposit, it should be made on the next open day.

Sashi -vs- Gobind, 18 C 331

See section 10 General Clauses Act, 1897.

Form of application by judgment-debtor to set aside sale on deposit, H. C. Form No. (J) 50.

Rule–90: Application to set aside sale on ground of irregularity or fraud.—(1) Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it, or on the ground of failure to issue notice to him as required by rule 22 of this Order:

Provided (i) that no sale shall be set aside on the ground of such irregularity fraud or failure unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure,

(ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied upon.

The words, "or on the ground of failure to issue notice to him as required by rule 22 of this Order," in sub-section (1) and the word, "such", after the words, "on the ground of", and the words, "or failure", after the word "fraud" twice in clause (i) of

the proviso to the said sub-section (1) and clause (ii) of the said proviso were added by the Calcutta High Court by rule made under section 122 vide Notification No. 3516-G dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February, 1933, Part-I, Page- 245.

Under this rule-

(i) the decree-holder, or

(ii) any person entitled to rateable distribution, or

(iii) any person "whose interests are affected by the sale",

may apply for setting aside the sale.

The words, "interests", not only means proprietary or possessory title but also pecuniary interests.

Dhirendra -vs- Kamini. 51 C 495

It covers every sort of interest recognized by law.

Ravinandan -vs- Jagarnath, 47 A 479

A person obtaining attachment before judgment is entitled to apply.

Sachai -vs- Kukari, 38 CWN 172

A share-holder of a company is not a person whose interests are affected by the sale. So, he is not compatent to apply under this rule.

Haji Abul Quasem -vs- Abdur Rahman Adam, 22 DLR 822

Person purchasing property after attachment and before sale can apply.

Bhupendra -vs- Jatindra, 37 CWN 912

Conditions for setting aside sale are–

(1) material irregularity or fraud in publishing or conducting the sale; or

(2) failure to issue notice as required by rule 22, and

(3) substantial injury of the applicant, and

(4) such injury must be the result of such material irregularity or fraud or failure.

Limitation for an application under this rule is 30 days from the date of the sale. See Article 166, Limitation Act, 1908.

Form of notice to show cause why sale should not be set aside, Form No. 36, App. E, Sch. I = H. C. Form No. (P) 47.

Rule–91: Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.—The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

This rule applies only where the judgment-debtor has no interest at all or when the interest was not saleable. It does not apply when the judgment-debtor has no saleable interest in a portion of the property.

Ram Coomer -vs- Soshee, 9 C 626;
Sonaram -vs- Mahiram, 28 C 235

Limitation for an application under this rule is 30 days from the date of the sale. See article 166, Limitation Act, 1908.

Form of notice to show cause why sale should not be set aside, Form No. 37, App. E, Sch. I = H. C. Form No. (P) 47.

Rule–92: Sale when to become absolute or be set aside.—(1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

On the happening of the event contemplated in sub rule (1), the court is bound to confirm the sale and no cognizance can be taken of the plea that the decree has been satisfied or adjusted out of court.

Nanhalal -vs- Umrao, 35 CWN 381 PC

Dismissing an application under rule 90 is not confirming the sale. The court has to pass an order.

Baruram -vs- Upendra, 38 CWN 924

The sales referred to in rules 89, 90 and 91 are sales in execution of a valid and subsisting decree. When therefore after the sale and before confirmation the decree is set aside, the sale cannot be confirmed.

Dayamoye -vs- Sarat, 25 C 175

A suit to set aside a sale on grounds other than those covered by rules 89, 90 and 91 lies.

Kalipada -vs- Basanta 59 C 117

Form of order confirming sale, H. C. Form No. (J) 51. Form of notice to show cause why sale should not be set aside, Form No. 36, 37, App. E, Sch. I = H. C. Form No. (P) 47.

Rule–93: Return of purchase money in certain cases.—Where a sale of immoveable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid.

Limitation for an application under this rule is three years, Article 181, Limitation Act.

Rule–94: Certificate to purchaser.—Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

See also rules 215-219, C.R. & O.

There is no limitation for application for sale certificate

Kylasa -vs- Ramasami 4 M 172
Vithal -vs- Vithojirav, 6 B 586

Sale certificate does not create title but is merely evidence of title.

Basir -vs- Hafiz, 43 C 124
Pramatha -vs- Samar, 57 C 783
Kalipada Saha -vs- Nityanada Saha, 5 DLR 285

Court has inherent power to correct sale certificate.

Nasiruddin -vs- Sayadur, 19 CLJ 209
Bugha -vs- Ram, 26 C 529
Gobinda -vs- Abhoy, 12 CWN 1027

Form of sale certificate, Form No. 38, App. E, Sch. I =H.C. Form No. (J) 52.

Rule–95: Delivery of property in occupancy of judgment-debtor.—Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

This rule contemplates actual or khas possession. Purchaser of a share in undivided property cannot get possession under this rule. His remedy is by a suit for partition.

Balaji -vs- Ganesh, 5 B 499

Where there is an appeal against an order refusing to set aside a sale, the sale does not become absolute until the disposal of the appeal.

Chandramani -vs- Anarjan, 61 C 945 PC

Limitation for an application under this rule is three years from the date when the sale became absolute. See Article 180, Limitation Act, 1908.

As to police aid in delivery of possession and resistance to peon, see rules 226-227, C.R & O.

Form of order for delivery of possession, Form No. 39, App. E, Sch. I = H. C. Form No. (P) 48.

Rule–96: Delivery of property in occupancy of tenant.—Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

This rule contemplates delivery of symbolical possession.

RESISTANCE TO DELIVERY OF POSSESSION TO DECREE-HOLDER OR PURCHASER

Rule–97: Resistance or obstruction to possession of immoveable property.—(1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

Under this rule, it is only the decree-holder or the auction purchaser who can apply.
Milkhi -vs- Basant, 1931 L 686

Requisition of police force when resistance is anticipated.

See rules 226, C.R. & O.

Form of summons to answer charge of obstructing execution, Form No. 40, App. E, Sch. I = H. C. Form No. (P) 49.

Rule–98: Resistance or obstruction by judgment-debtor.—Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, or on his behalf, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor or any person acting at his instigation, or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

The words, "or on his behalf," occurring twice in this rule were inserted by rule made by the Calcutta High Court under section 122 vide Notification No. 3516-G dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February, 1933 Part-I, Page-245.

Possession in this rule includes constructive possession.

Mancharam -vs- Fakir, 25 B 478
Brajabala -vs- Gurudas, 33 C 487

A tenant of the judgment-debtor is bound by the decree and he is not a person claiming on his own account.

Jairam -vs- Nowroji, 46 B 887
Jafferji -vs- Miyadin, 46 B 536
Appa -vs- Venkappa, 1931 M 534
Yusuf -vs- Jyotish, 59 C 739

Form of committal warrant, Form No. 41, App. E, Sch. I.

Rule–99: Resistance or obstruction by *bona fide* claimant.— Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to have a right to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

The words, "to have a right," occurring after the words, "claiming in good faith", were inserted by rule made by the Calcutta High Court under section 122 vide Notification No. 3516-G, dated the 3rd February, 1933 published in the Calcutta Gazette dated the 9th February, 1933, Part-I, Page-245.

Rule–100: Dispossession by decree-holder or purchaser.—(1) Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

Delivery of symbolic possession under rule 96 does not constitute dispossession. It is only delivery of actual possession under rule 95, that constitutes dispossession within this rule.

Ibrahim -vs- Ramjadu, 30 C 710
Brajabala -vs- Gurudas, 33 C 487

Purchaser getting symbolical possession cannot remove crop when land is in actual possession of third person.

Banka -vs- Abdul, 39 CWN 1306

A person in joint possession with the judgment-debtor as a member of a joint family is in possession "on his own account"

Radhagobind vs- Rajhunath, 18 CWN 695
Indubhusan -vs- Haricharan, 58 C 55

Limitation for an application under this rule is thirty days, Article 165, Limitation Act.

Rule–101: *Bona fide* claimant to be restored to possession.— Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

Rule–102: Rules not applicable to transferee *lite pendente*.— Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

This rule says that nothing in rr. 99 and 101 applies to resistance by a transferee from the judgment-debtor during the pending of the suit.

Rule–103: Orders conclusive subject to regular suit.—Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive.

This rule does not apply unless an order under rule 98, 99 or 101 has been made.

Hargo -vs- Chandu, 69 IC 557

The pre-condition for a suit under this rule is an order under rule 98, rule 99 or rule 101. So, when there is no order under either of those rules, no suit can be brought under this rule. When the court refers the applicant to a separate suit without passing any order or dismisses the application for default, this rule does not apply.

Meerudin -vs- Rahisa, 27 M 25; Sarat -vs- Tarini, 34 C 491

Limitation for a suit under this rule is one year, Article 11A, Limitation Act.

Order XXIA

Rule–1: Every person applying to a Civil Court to attach movable property shall, in addition to the process-fee, deposit such reasonable sum as the Court may direct, if it thinks necessary, for the cost of its removal to the court –house, for its custody, and, if such property is livestock, for its maintenance according to the rates prescribed in rule 2 of this Order. If the deposit, when ordered, be not made, the attachment shall not issue. The Court may, from time to time, order the deposit of such further fees as may be necessary. In default of due payment the property shall be released from attachment.

See rule 133, C. R. & O.

Rule–2: The following daily rates shall be chargeable for the custody and maintenance of livestock under attachment;–

Goat and pig-Annas 2 to annas 4.
Sheep –Annas 2 to annas 3.
Cow and bullock–Annas 6 to annas 10.
Calf–Annas 3 to annas 6.
Buffalo–Annas 8 to annas 12.
Horse–Annas 8 to annas 12.
Ass–Annas 3 to annas 5.
Poultry–Annas 2 to annas 3 pies6.

Explanation—Although the rates indicated above are regarded as reasonable, the Courts should consider individual circumstances and the local conditions and permit deposit at reduced rates where the actual expenses are likely to fall short of the minima or maxima. If any specimen of special value in any of the above classes is seized a special rate may be fixed by the Court. If any animal not specified is attached, the Court may fix the cost as a special case.

Rule–3: When the property attached consists of agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the provisio to rule 43, Order 21, he may, unless the Court has otherwise directed, leave it in the village or place where it has been attached–

(a) in the charge of the judgment-debtor or decree-holder or of some other person , provided that the judgment-debtor, decree-holder or other person enters into a bond in Form No. 15A of

Appendix E to this Schedule with one or more sureties for the production of the property when called for, or,

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of fifteen days paid in advance.

See rules 189-192 and 194-199, C.R. & O.
Form of bond, Form No. 15A, App. E, Sch. I = H. C. Form No. (M) 29.

Rule–4: If attached property (other than livestock) is not sold under the proviso to rule 43, Order 21, or retained in the village or place where it is attached, it shall be brought to the Court-house at the decree-holder's expense and delivered to the proper officer of the Court. In the event of the decree-holder failing to make his own arrangement for the removal of the property with safety, or paying the cost thereof in advance to the attaching officer, then, unless such payment has previously been made into Court, the attachment shall at once be deemed to be withdrawn and the property shall be made over to the person in whose possession it was before attachment.

See rule 599(4), C.R. & O

Rule–5: When livestock is attached it shall not, without the special order of the Court, be brought to the Court or its compound or vicinity, but shall be left at the village or place where it was attached in the manner and on the conditions set forth in rule 3 of this Order:

Provided that livestock shall not be left in the charge of any person under clause (a) of the said rule unless he enters into a bond for the proper care and maintenance thereof as well as for its production when called for, and that it shall not be left in charge of an officer of the Court under clause (b) of the said rule unless in addition to the requirements of the said clause provision be made for its care and maintenance.

See rules 189-192 and 194-199, C.R & O.
Form of bond, Form No. 15A, App. E, Sch. I=H.C. Form No. (M) 29.

Rule–6: When for any reason the attaching officer shall find it impossible to obtain compliance with the requirements of the preceding rule so as to entitle him to leave the attached livestock in the village or place where it was attached and no order has been made by the Court for its removal to the Court, the attaching officer shall not proceed with the attachment and no attachment shall be deemed to have been effected.

Rule–7: Whenever it shall appear to the Court that livestock under attachment are not being properly tended or maintained, the Court shall make such orders as are necessary for their care and maintenance and may if necessary direct the attachment to cease and the livestock to be returned to the person in whose possession they were when attached. The Court may order the decree-holder to pay any expenses so incurred in providing for the care and maintenance of the livestock, and may direct that any sum so paid shall be refunded to the decree-holder by any other party to the proceedings.

See rules 250 and 599 (4), C.R. & O.

Rule–8: If under a special order of the Court livestock is to be conveyed to the Court, the decree-holder shall make his own arrangement for such removal, and if he fails to do so the attachment shall be withdrawn and the property made over to the person in whose possession it was before attachment.

See rule 599(4), C.R. & O.

Rule–9: Nothing in these rules shall prevent the judgment-debtor or any person claiming to be interested in attached livestock from making such arrangements for feeding, watering and tending the same as may not be inconsistent with its safe custody, or contrary to any order of the Court.

Rule–10: The Court may direct that any sums which have been legitimately expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the sale-proceeds of the attached property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

Rule–11: In the event of the custodian of attached property failing, after due notice, to produce such property at the place named to the officer deputed for the purpose, or to restore it to its owner if so ordered or failing in the case of livestock to maintain and take proper care thereof, he shall be liable to be proceeded against for the enforcement of his bond in the execution proceedings.

Rule–12: When property other than livestock is brought to the Court, it shall immediately be made over to the Nazir, who shall keep it on his sole responsibility in such place as may be approved by the Court. If the property cannot from its nature or bulk be conveniently stored, or kept on

the Court premises or in the personal custody of the Nazir, he may, subject to the approval of the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical. If any premises are to be hired and persons are to be engaged for watching the property the Court shall fix the charges for the premises and the remuneration to be allowed to the persons (not being officers of the Court) in whose custody the property is kept. All such costs shall be paid into Court by the decree-holder in advance for such period as the Court may from time to time direct.

Rule–13: When attached livestock is brought to Court under special order as aforesaid it shall be immediately made over to the Nazir, who shall be responsible for its due preservation and safe custody until he delivers it up under the orders of the Court.

Rule–14: If there be a pound maintained by Government or local authority in or near the place where the Court is held, the Nazir shall, subject to the approval of the Court, be at liberty to place in it such livestock as can be properly kept there, in which case the pound keeper will be responsible for the property to the Nazir and shall receive from the Nazir the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

Rule–15: If there be no pound available, or, if in the opinion of the Court, it be inconvenient to lodge the attached livestock in the pound, the Nazir may keep them in his own premises, or he may entrust them to any person selected by himself and approved by the Court.

Rule-16: All costs for the keeping and maintenance of the livestock shall be paid into Court by the decree-holder in advance for not less than fifteen days at a time as often as the Court may from time to time direct. In the event of failure to pay the costs within the time fixed by the Court, the attachment shall be withdrawn and the livestock shall be at the disposal of the person in whose possession it was at the time of attachment.

See also rules 173 and 599 (4) C.R. & O.

Rule–17: So much of any sum deposited or paid into Court under these rules as may not be expended shall be refunded to the depositor.

This Order 21A including rules 1-17 was inserted by rule made by the Calcutta High Court under section 122 vide Notification No. 25585-G dated the 3rd November, 1933 published in the Calcutta Gazette dated the 9th November, 1933, Part–I, Page–1617.

Order XXII

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

Rule–1: No abatement by party's death if right to sue survives.— The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

As to when the right to sue survives, see section 306, Indian Succession Act (Act XXXIX of 1925) and section 37, Indian Contract Act, (Act IX of 1872).

Rule–2: Procedure where one or several plaintiffs or defendants dies and right to sue services.—Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

In a case under Or. 1, r. 8 (representative suit) no substitution of legal representative of plaintiffs is necessary if one of them dies.

Samarendra -vs- Harendra 39 C.W.N. 303

Rule–3: Procedure in case of death of one of several plaintiffs or of sole plaintiff.—(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

If on the death of one of several plaintiffs the right to sue does not survive to the surviving plaintiffs alone and the legal representatives of the deceased plaintiff are not brought on record within the prescribed time, the suit shall in the first instance abate so far as the deceased plaintiff is

concerned. But if the suit is of such a kind that it cannot proceed in the absence of the legal representatives of the deceased plaintiff, it will abate as a whole.

Rajchunder -vs- Ganga, 31 C 487 PC
Narendra -vs- Satya, 30 CLJ 203

Abatement on the death of a party follows automatically unless heirs are substituted within time. No formal order of abatement is imperative although desirable.

Abdul Aziz -vs- Abani Mohan, 30 DLR (SC), 221

Limitation for an application under this rule is 90 days, Article 176, Limitation Act.

Rule–4: Procedure in case of death of one of several defendants or sole defendant.—(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased-defendant.

(4) Notwithstanding anything contained in sub-rule (3), the plaintiff shall not be required to substitute and shall be exempt from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who having filed it, has failed to appear and contest the suit at the hearing; and judgment may in such a case be pronounced against the deceased defendant notwithstanding the death of such defendant and shall have the same force and effect as if it had been pronounced before the death took place.

Sub-rule (4) was added by Ordinance XLVIII of 1983.

This rule applies to the case of death of defendant and proceeds on the same lines as rule 3.

If no application is made within the prescribed period of 90 days (Article 177, Limitation Act. 1908) the suit abates as against the deceased defendant and the only remedy is an application under Order 22 rule 9 (2) within 60 days from the date of abatement (Article 171, Limitation Act, 1908).

Form of summons to legal representative of deceased defendant, Form No. 6 App. B, Sch. I = H. C. Form No. (P) 6.

Rule–5: Determination of question as to legal representative.— Where a question arises as to whether any person is or not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

When rival parties claim to be the legal representatives of a deceased plaintiff or a deceased defendant or when there is only one claimant and his representative character is questioned, the court must determine the question.

Rule–6: No abatement by reason of death after hearing.— Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

Rule–7: Suit not abated by marriage of female party.—(1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject–matter of the decree.

Rule–8: When plaintiff's insolvency bars suit.—(1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

Procedure where assignee fails to continue suit or give security.– (2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's

insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

In the circumstances of the case as described in this rule, the suit should not be dismissed for default under Or. 9, r. 8 of the Code for failure of the plaintiff to appear because there is known to be no person in the position of the plaintiff who has any right or duty to appear.

Kissen -vs- Suklal, 53 C 844

Rule 9: Effect of abatement or dismissal.—(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of sections 4 and 5 of the Limitation Act, 1908 shall apply to applications under sub-rule (2).

The words and figures, "sections 4 and 5," were substituted for the word and figure, "section 5," by Act VIII of 1973 as amended by Act LIII of 1974.

No formal order of abatement is necessary, as abatement is automatic. Therefore limitation runs from the expiry of the period within which application to bring legal representatives on record is to be made.

Ramgopal -vs- Harkishen, 1925, L 598
Sharat -vs- Maihar, S&L Co. 49 C 62
Abdul Aziz vs- Abani Mohan, 30 DLR (SC) 221

The following persons can apply:– (a) the plaintiff, Or. 22, r. 4 (3); (b) the legal representative of a deceased plaintiff, Or. 22, r. 3 (2); (c) the assignee of an insolvent plaintiff, Or. 22, r.8 (2).
Limitation for an application under this rule is 60 days from the date of abatement. In a proper case time may be extended under section 5, Limitation Act (sub-rule (3) of this rule). No formal order of abatement is necessary as abatement is automatic under rules 3 and 4. Limitation therefore runs from the expiry of the period within which application to bring legal representatives on record is to be made.

Rule–10: Procedure in case of assignment before final order in suit.—(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

"Other cases" mean cases other than those specifically mentioned in the previous rules.

Bhagwan -vs- Nilkanta, 9 C.W.N. 171

There is no period of limitation for application under this rule as the right to apply in a pending suit accrues from day to day.

Kedar -vs- Hara, 8 C 420
Rajani -vs- Jyoti, 27 CWN 710

Rule–11: Application of Order to appeals.—In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

Provided always that where an Appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased under Order XLI, rule 14(3), the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party.

The proviso was added by rule made by the Calcutta High Court under section 122 vide Notification No. 10428-G, dated the 25th July, 1928 published in the Calcutta Gazette dated the 2nd August, 1928, Part–1, Page–1643.

Rule–12: Application of Order to proceedings.—Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

The penalty of abatement does not attach to execution proceedings as execution applications can be filed any number of times so long as the decree is alive. On the death of an applicant for execution, it is not competent to apply for substitution. The legal representatives can apply for fresh execution or they can apply immediately for carrying on the proceedings in execution.

Akshay -vs- Surendra, 30 CWN 735

Order XXIII

WITHDRAWAL AND ADJUSTMENT OF SUITS

Rule–1: Withdrawal of suit or abandonment of part of claim.— (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied–

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

See also para 33, Civil Suit Instructions Manual. The court should be guided by the instruction contained in this paragraph while dealing with application for withdrawal of a suit and from a suit. Withdrawal of a suit under sub-rule (1) may be done at any time and to do it no order by the court is necessary and in this case the plaintiff has no right to bring a fresh suit in respect of the same subject-matter. Withdrawal from a suit with the right to institute a fresh suit in respect of the same subject-matter is contemplated by sub-rule (2) and in this case leave by the court is necessary and the plaintiff must make out a case within clause (a) or clause (b).

If permission is granted to withdraw with liberty to sue afresh on condition of payment of costs within a specified time, it is better to record a complete and final order, such as, that the suit shall stand dismissed on the failure to pay the costs by the stipulated date, instead of a conditional order, such as, that the suit shall be dismissed on the failure to pay the costs by the stipulated date in which case a further order will be necessary to make the order of dismissal.

Sital -vs- Goya, 19 CLJ 529
Abdul -vs-Susi, 39 CWN 330

Plaintiff may withdraw suit both in the trial court as well as in the appellate court.

Ramijuddin Chawkider -vs- Haji Baser Ahmed Molla, 25 DLR 222

Formal defect explained, ibid

Court must satisfy itself that formal defect exists and it is incumbent upon it to record reasons when giving permission under sub-rule (2).

Kiranmayi -vs- Ramanath, 64 IC 556
Subashini -vs- Ashutosh, 39 CLJ 371

Where a suit has been heard and decided on merit no withdrawal should be granted under sub-rule (2).

Ramsaran -vs- Radha, 55 C 1067

Rule–2: Limitation law not affected by fresh suit.—In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

Rule–3: Compromise of suit.—Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

An agreement, compromise or satisfaction may be in respect of the whole suit or a part of the suit. It may also include extraneous matters, which do not relate to the suit. Where the compromise comprises matters extraneous to the suit the proper course is to recite the whole of the agreement in the decree but to pass a decree in accordance therewith only in so far as it relates to the decree.

Govinda -vs- Dwarka, 7 CLJ 492
Jiban -vs- Ramesh, 38 CLJ 72
Hemanta Kumari -vs- Midnapur Zamindary Co. 47 C 485
Md. Idris Miah -vs- Abdul Motaleb, 27 DLR 599

Rule–4: Proceedings in execution of decrees not affected.—Nothing in this Order shall apply to any proceedings in execution of a decree or order.

The rules in this Order do not apply to execution proceedings.

Order XXIV

PAYMENT INTO COURT

Rule–1: Deposit by defendant of amount in satisfaction of claim.—The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

Mere allegation of willingness to pay is not sufficient.

Haji -vs- Haji, 16 B 141

Deposit must be unconditional.

Bose & Co. -vs- Allen Bros 97 IC 479

Rule–2: Notice of deposit.—Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

Form of notice under this rule, Form No. 3, App. H, Sch. I.

Rule–3: Interest on deposit not allowed to plaintiff after notice.—No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.

The principle of this rule applies to execution proceedings

Amtul -vs- Muhammad, 40 A 125

Rule–4: Procedure where plaintiff accepts deposit as satisfaction in part.—(1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

Procedure where he accepts it as satisfaction in full.–(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

ILLUSTRATIONS

(a) A owes B Taka 100. B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) B sues A under the circumstances mentioned in illustration (a). On the plaint being filed, A disputes the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suit, A's conduct having shown that the litigation was necessary.

(c) A owes B Taka 100, and is willing to pay him that sum without suit. B claims Taka 150 and sues A for that amount. On the plaint being filed A pays taka 100 into Court and disputes only his liability to pay the remaining Taka 50. B accepts the Taka 100 in full satisfaction of his claim. The Court should order him to pay A's costs.

Order XXV

SECURITY FOR COSTS

Rule–1: When security for costs may be required from plaintiff.—(1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of Bangladesh, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within Bangladesh other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

Residence out of Bangladesh–(2) Whoever leaves Bangladesh under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of Bangladesh within the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within Bangladesh.

The discretion indicated by the word "may" is unfettered and unqualified.

Calico P.A. Ltd. -vs- Jeevanram, 40 CWN 511

Mere poverty is no ground for requiring the plaintiff to give security for costs; it is otherwise where he is not the real litigant but a mere puppet in the hands of others.

Kajah -vs- Solemon, 14 C 533;
Harinath -vs- Ramkumar, 18 CWN 119

Rule–2: Effect of failure to furnish security.—(1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw thereform.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause

from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

Dismissal of a suit for failure to give security does not operate as *res judicata.*

Rungrav -vs- Sidhi, 6 B 482
Hariram -vs- Lalbai, 26 B. 637